

## DEPARTMENT OF STATE REVENUE

04970246.LOF

LETTER OF FINDINGS NUMBER: 97-0246 ST

Sales and Use Tax

For The Period: 1991-1995

**NOTICE:** Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

### ISSUES

#### **I. Sales and Use Tax – Installation Charges**

**Authority:** IC 6-2.5-4-1; IC 6-2.5-1-1

The taxpayer protests the imposition of sales tax on the installation of Automatic Teller Machines (ATMs).

### STATEMENT OF FACTS

The taxpayer sells ATMs and other financial equipment. The taxpayer also offers an installation option for its customers. Installation is not a complex procedure and over a third of the taxpayer's customers forego the installation costs and either hire a contractor to install or simply do the task themselves.

During installation, the taxpayer does not do any construction work to the building; (e.g. cutting a hole in the wall to place the machine) any alteration to the frame of the building must be done by the taxpayer or a third party contractor. The process as detailed by a videotape submitted by the taxpayer merely consists of placing the machine on a base, assembling a few internal cartridges, attaching a modem line, and plugging the machine into the wall.

The taxpayer contracts for the sale and sometimes installation of the ATMs with a single agreement. The auditor characterizes this as a unitary transaction.

#### **I. Sales/Use Tax - Installation Charges**

### DISCUSSION

A unitary transaction is defined as "[a]ll items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." IC 6-2.5-1-1(a).

The auditor characterizes the transactions at issue as unitary. The taxpayer disputes this by contending that the personal property and services provided are extricable and divisible because it separately states them on the customer invoices. In response to this, the Audit Division supplied an example of the contracts used by the taxpayer. In the contract, the taxpayer's customers contract for materials, installation, shipping, plus any applicable sales or use taxes. The amount at the bottom of the contract is a single dollar amount. This contract illustrates that the transactions at hand are furnished under a single order or agreement as the statute requires.

The taxpayer argues that the transaction is not unitary because it believes that by following commercial law the title passed to the taxpayer's customer at the time and place of shipment. The taxpayer views the installation as services performed after transfer of the product. As a result, the taxpayer states that the property was transferred at the time of its shipment. In support of its argument, the taxpayer cites IC 6-2.5-4-1 in respect to sales and use tax. Section (e) states:

The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to the property transferred before its transfer, and which are separately stated on the transferor's records.

The taxpayer argues that since the contract stipulates that title passes FOB shipping point, the services provided are completed before its transfer as provided for in IC 6-2.5-4-1(e)(2). The Department finds that even if it is accepted that the services are performed after the transfer, the transaction is still subject to tax because it was part of a single agreement. The separate listing of the installation price on the invoice does nothing to change this fact. The Indiana Code at 6-2.5-1-1(a) defines "unitary transaction" as "all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated."

The taxpayer also relies upon Information Bulletin No. 46, which stated, "services, and services rendered in respect to property not owned by the person rendering a service, are not subject to sales tax since no tangible personal property is being transferred for consideration." The Department in September of 1994 deleted this bulletin. However, this is not determinative because the Department finds that the property was not transferred by the

taxpayer until installation was complete.

The taxpayer brings the case of Cowden & Sons Trucking, Inc. v. Dept of Revenue, 575 N.E.2d 718 (Ind.Tax Ct. 1991). In Cowden, the taxpayer hauled stone from a quarry to a location chosen by the customer. As part of the hauling contract, Cowden would pay the purchase price of the stone in addition to sales tax applicable when it picked up the stone from the quarry. After delivery, the customer reimbursed Cowden for the payment of the stone. The court held that non-taxable services are taxable when the rendition of services and transfer of property in a retail transaction are inextricable and indivisible.

In Cowden, the court looked to the nature of Cowden's business and determined that ninety-five percent (95%) of its customers received only hauling services, while the remaining five (5%) purchased both hauling services and stone. In doing so, the court noted Cowden's "distinct and incidental nature of Cowden's sales." Id. at 723. In Cowden and Sons, the divisibility of Cowden's transactions was also supported by the overall nature of Cowden's business, which was almost exclusively providing transportation. The infrequency of Cowden's transfers of stone emphasized the distinct and incidental nature of Cowden's sales. Id. Also, the court noted Cowden's lack of inventory and its purchase of stone only at its customer's request. Id.

In contrast, the nature of the taxpayer's business is to sell tangible personal property. It is significant to note that installation services are *only* provided in conjunction with the sale of tangible personal property. In spite of this, the taxpayer believes that the nature of the Cowden transactions was closer to being unitary than the transactions of the taxpayer. The taxpayer bases this belief on the theory that its delivery of tangible personal property and installation services are not performed simultaneously as was done in Cowden. As stated before, this is not a determinative factor because when the customer chooses installation, the Department finds that the property is not transferred until the ATM is installed.

The transactions at issue here are unitary as they are under one agreement. Therefore, the entire contract is subject to tax.

#### **FINDING**

The taxpayer's protest is respectfully denied to the extent that the taxpayer and its customers contracted for the sale of the ATM and installation under one contract.